

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID ARNOLD,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,

Defendant.

Case No. 3:14-cv-00421-MMD-WGC
ORDER REGARDING REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE
WILLIAM G. COBB

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (ECF No. 6) ("R&R") relating to Plaintiff David Arnold's ("Arnold") amended complaint (ECF No. 5). The Court has reviewed Plaintiff's objections. (ECF No. 10.) For the reasons discussed below, the R&R is accepted in part. Arnold's amended complaint is dismissed without prejudice with respect to his Rehabilitation Act claim and dismissed with prejudice on all other counts.

II. BACKGROUND

Arnold, litigating *pro se*, filed an application to proceed in forma pauperis accompanied by a proposed complaint on August 13, 2014. (ECF Nos. 1, 1-1.) His complaint centers on the allegations that he was forced, by threat of arrest and seizure of his belongings, to leave his campsite in a national park before the applicable park rules required him to do so.¹ Arnold seeks \$1,000,000 in damages, as well as injunctive relief, fees and costs. (ECF No. 1-1 at 13.) On August 26, 2014, the Magistrate Judge

¹Arnold objects to the R&R's characterization that he was asked rather than forced or ordered to leave his campsite. For the purposes of its analysis, the Court will use Arnold's preferred formulation.

1 granted Arnold's application to proceed in forma pauperis and screened the complaint
2 pursuant to 28 U.S.C. § 1915. (ECF No. 3.) Arnold's complaint was dismissed without
3 prejudice because it failed to state a claim, and he was given leave to amend to correct
4 the deficiencies noted by the Magistrate Judge. (*Id.*) Arnold filed an amended complaint
5 on September 15, 2014. (ECF No. 5.) Judge Cobb issued the R&R, recommending this
6 Court dismiss the amended complaint with prejudice and deny Arnold's request for a
7 preliminary injunction as moot. (ECF No. 6.)

8 In his objections, Arnold raises a number of procedural and substantive
9 arguments. He argues that a magistrate judge had no jurisdiction to screen his complaint
10 (ECF No. 10 at 4), that Magistrate Judge Cobb was biased because he had also
11 presided over criminal proceedings against Arnold (*id.* at 7),² that the R&R
12 mischaracterizes the allegations (*id.* at 15-17), that his allegations support cognizable
13 claims for relief (*id.* at 22-24), and finally that even if he has not stated claims, his
14 complaint should not be dismissed with prejudice (*id.* at 21). The Court will address each
15 of these objections in turn.

16 **III. LEGAL STANDARD**

17 This Court "may accept, reject, or modify, in whole or in part, the findings or
18 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
19 timely objects to a magistrate judge's report and recommendation, then the court is
20 required to "make a *de novo* determination of those portions of the report and
21 recommendation to which objection is made." 28 U.S.C. § 636(b)(1). In light of Arnold's
22 objections, the Court has engaged in a *de novo* review to determine whether to adopt
23 Magistrate Judge Cobb's recommendations.

24 28 U.S.C. § 1915 provides that "the court shall dismiss the case at any time if the
25 court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state
26 a claim upon which relief may be granted; or (iii) seeks monetary relief against a

27 ²Arnold additionally requests that the R&R be stricken from the record and Judge
28 Cobb be removed from this case and sanctioned. (ECF No. 10 at 9.)

1 defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). This
2 provision applies to all actions filed in forma pauperis, whether or not the plaintiff is
3 incarcerated. See *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc)
4 (“section 1915(e) applies to all in forma pauperis complaints, not just those filed by
5 prisoners”); see also *Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

6 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which
7 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
8 provide “a short and plain statement of the claim showing that the pleader is entitled to
9 relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
10 The Rule 8 notice pleading standard requires Plaintiff to “give the defendant fair notice of
11 what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555
12 (internal quotation marks and citation omitted). While Rule 8 does not require detailed
13 factual allegations, it demands more than “labels and conclusions” or a “formulaic
14 recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
15 (2009) (quoting *Twombly*, 550 U.S. at 555). “Factual allegations must be enough to rise
16 above the speculative level.” *Twombly*, 550 U.S. at 555. When determining the
17 sufficiency of a claim, “[w]e accept factual allegations in the complaint as true and
18 construe the pleadings in the light most favorable to the non-moving party[; however, this
19 tenet does not apply to] . . . legal conclusions . . . cast in the form of factual allegations.”
20 *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (citation and internal quotation
21 marks omitted).

22 Mindful of the fact that the Supreme Court has “instructed the federal courts to
23 liberally construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d
24 1132, 1137 (9th Cir. 1987), the Court will view Arnold’s pleadings with the appropriate
25 degree of leniency.

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1 **IV. DISCUSSION**

2 The Court agrees with the R&R's recommendation to dismiss Arnold's amended
3 complaint with prejudice, except with respect to his retaliation claim based on the
4 Rehabilitation Act.

5 **A. Authority of a Magistrate Judge**

6 As an initial matter, Arnold questions a magistrate judge's authority to dismiss his
7 complaint with leave to amend. Rather than challenge the Magistrate Judge's order
8 when it was issued, however, Arnold filed an amended complaint. In any event, the
9 Magistrate Judge was acting within his authority. Dismissal with leave to amend is non-
10 dispositive and therefore within the authority granted by 18 U.S.C. § 636. The order did
11 not end Arnold's suit, rather, it gave him the opportunity correct his complaint. The Ninth
12 Circuit has recognized the distinction between non-dispositive dismissals and dispositive
13 ones. See *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991) ("As to non-dispositive
14 matters . . . a magistrate can, for example, dismiss a complaint with leave to amend
15 without approval by the court.").

16 28 U.S.C. § 1915 allows a plaintiff to proceed with a lawsuit without paying a filing
17 fee if the plaintiff is able to show that they are indigent. Courts are required to screen an
18 *in forma pauperis* complaint to determine whether dismissal is appropriate under certain
19 circumstances.³ See *Lopez*, 203 F.3d at 1126 (noting that the *in forma pauperis* statute
20 at 28 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis*
21 complaint for the enumerated reasons). Section 1915(e)(B)(ii) directs courts to dismiss
22 the case "at any time" if it determines that the plaintiff has failed to state a claim upon
23 which relief may be granted. Though the word "prisoner" appears throughout § 1915, the
24 requirement that a court dismiss a complaint which fails to state a claim applies to

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26 ³Arnold may be confused, understandably, because the Magistrate Judge used
27 the term "screening" in the R&R. The Magistrate Judge was acting under the authority of
28 28 U.S.C. § 636(b)(1)(A) and LR IB 1-4, which allows a magistrate judge to "file findings
and recommendations for disposition by the district judge." In this district, reviews of *in*
forma pauperis complaints are referred to magistrate judges as a matter of course.

1 prisoners as well as non-prisoners proceeding *in forma pauperis*. See *id.* at 1129 ; see
2 also see also *Calhoun*, 254 F.3d 845.

3 The Magistrate Judge acted within his authority in screening Plaintiff's complaint
4 and amended complaint.

5 **B. Bias**

6 Arnold asserts that Judge Cobb is biased because Arnold previously appeared
7 before him and appealed a number of his rulings. (ECF No. 10 at 8, 20, 21.) In fact,
8 Arnold goes on to request that Judge Cobb be removed from the case and sanctioned.
9 (*Id.* at 10.)

10 The substantive standard for recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455
11 is: "[W]hether a reasonable person with knowledge of all the facts would conclude that
12 the judge's impartiality might reasonably be questioned." *United States v. Studley*, 783
13 F.2d 934, 939 (9th Cir.1986) (quotation omitted). Normally, the alleged bias must stem
14 from an "extrajudicial source." *Liteky v. United States*, 510 U.S. 540, 554-56, 114 S.Ct.
15 1147, 1157, 127 L.Ed.2d 474 (1994). "[J]udicial rulings alone almost never constitute
16 valid basis for a bias or partiality motion." *Id.* "[O]pinions formed by the judge on the
17 basis of facts introduced or events occurring in the course of the current proceedings, or
18 of prior proceedings, do not constitute a basis for a bias or partiality motion unless they
19 display a deep-seated favoritism or antagonism that would make fair judgment
20 impossible." *Id.*

21 Arnold has not alleged any plausible basis for finding the Magistrate Judge was
22 biased. The R&R explains its reasoning based on Arnold's allegations and the applicable
23 law. Arnold contends that the Court's failure to direct service on defendants and
24 schedule a hearing on his motion for preliminary injunction is evidence of bias.⁴
25 However, this process applies in every case that involves an *in forma pauperis*
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27 ⁴Arnold has included preliminary injunctive relief as a remedy in his amended
28 complaint. He has not filed a separate motion for preliminary injunction. Moreover,
whether a hearing is set on such a motion is within the Court's discretion.

1 application. The court screens the complaint first and only directs service if the complaint
2 states a claim. Indeed, the court may dismiss an action filed *in forma pauperis* before
3 service of process if it is clear that the plaintiff cannot make out a claim. See, e.g.,
4 *Cooper v. Sumner*, 672 F. Supp. 1361, 1364 (D. Nev. 1987). In sum, there is no support
5 for Arnold's claim that the Magistrate Judge's conclusions were motivated by any bias.

6 **C. Claims**

7 Arnold divides his amended complaint into three causes of action. (ECF No. 5 at
8 8-17.) The three sections he identifies as causes, however, are not actually three legal
9 bases for a civil claim. Cause 1 and Cause 2 identified several, sometimes overlapping,
10 legal theories, and Cause 3 is a request for a preliminary injunction rather than a cause
11 of action. For the purpose of clarity, the Court will address each of the legal theories he
12 references in his amended complaint separately.

13 **1. FTCA**

14 The R&R finds that Arnold has not stated a claim under the Federal Tort Claims
15 Act ("FTCA") because Arnold has not alleged that he exhausted administrative remedies,
16 as required by the statute, and even if he did, the underlying conduct does not amount to
17 a tort under Nevada law. (ECF No. 6 at 6.) Arnold variously characterizes being forced to
18 leave his campsite as "criminal assault," "terroristic threatening behavior," "harassment,"
19 and assault with a deadly weapon. (ECF No. 5 at 1, 14.) Even drawing every inference in
20 his favor, none of these descriptions accurately characterize the interactions with federal
21 officials that he alleges in his amended complaint.

22 Arnold describes the R&R's conclusion that he has not stated a cognizable tort
23 under Nevada law "ridiculous" because "Nevada law is irrelevant" to his claims. (ECF
24 No. 10 at 19.) The FTCA, however, applies to federal employees "if a private person,
25 would be liable to the claimant in accordance with the law of the place where the act or
26 omission occurred." 28 U.S.C. § 1346(b)(1). In other words, the statute relies on state
27 law definitions of torts. In the case of a tort that is alleged to have taken place in a
28 national park, the law from the state in which the park sits governs. See *Muchhala v.*

1 *United States*, 532 F. Supp. 2d 1215, 1226 (E.D. Cal. 2007) (“Here, even though the
2 relevant events took place within the boundaries of Yosemite National Park . . .
3 California tort law provides the applicable substantive law with respect to the underlying
4 tort claim.”).

5 The R&R applied the appropriate legal standard to Arnold’s FTCA claim and
6 correctly concluded that his allegations do not amount to any cognizable tort under
7 Nevada law.

8 **2. Rehabilitation Act and ADA**

9 Arnold alleges that he filed a request to waive his 14-day camping limit in order to
10 “stay longer so that he could get proper medical care.” (ECF No. 5 at 11.) Arnold also
11 alleges that his disabilities made it difficult for him to leave his campsite on short notice.
12 (*Id.*) Arnold asserts that his request was initially approved by officials, and he was given
13 permission to stay while the request was considered further. (*Id.* at 11-12.) Two
14 unnamed officers, who were aware of Arnold’s request, showed up a few days later and
15 informed Arnold that he needed to leave immediately. (*Id.* at 12.) Elsewhere in the
16 amended complaint, Arnold clarifies the contours of his claim: “note that the present
17 Complaint is not addressing the issue of the Reasonable Accommodation request for
18 Plaintiff’s disability, as that has not yet been decided on . . . but only Defendant’s actions
19 related to Plaintiff’s filing of it and the temporary granting of it.” (*Id.* at 15.) In other words,
20 Arnold appears to believe that he was retaliated against for filing a request to
21 accommodate his disability.

22 Arnold cannot state a claim under the Americans with Disabilities Act (“ADA”).
23 Neither Title II (public services) nor Title III (public accommodations) of the ADA applies
24 to an executive agency like the United States Forest Service. See 42 U.S.C. § 12131,
25 1218; see also *Isle Royale Boaters Ass’n v. Norton*, 154 F. Supp. 2d 1098, 1135 (W.D.
26 Mich. 2001) (“Plaintiffs may not sue NPS, a unit of the federal government, for
27 discrimination under the ADA”), *aff’d*, 330 F.3d 777 (6th Cir. 2003); *Sandison v. Michigan*
28 *High Sch. Athletic Ass’n, Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995) (“Place of public

1 accommodation means a facility, operated by a private entity . . . Public school grounds
2 and public parks are of course operated by public entities, and thus cannot constitute
3 public accommodations under title III.").

4 Section 504(a) of the Rehabilitation Act prohibits discrimination against qualified
5 individuals with a disability "under any program or activity receiving Federal financial
6 assistance or under any program or activity conducted by any Executive agency." 29
7 U.S.C. § 794(a). To state a claim under § 504 of the Rehabilitation Act, a plaintiff must
8 show: "(1) he is an individual with a disability; (2) he is otherwise qualified to receive the
9 benefit; (3) he was denied the benefits of the program solely by reason of his disability;
10 and (4) the program receives federal financial assistance." *Weinreich v. Los Angeles*
11 *Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) (quotations omitted).

12 The R&R concluded that Arnold's allegations do not support a claim under the
13 Rehabilitation Act — Arnold does not allege that he was forced to leave solely based on
14 his disability, but rather due to a number of factors, including a simple misapplication of
15 the appropriate time limit. (ECF No. 6 at 7.) The R&R is correct that the amended
16 complaint does not clearly state a claim based on a failure to accommodate Arnold in
17 violation of the Rehabilitation Act.

18 The Rehabilitation Act, however, also prohibits retaliation against claimants for
19 attempting to enforce its protections. Title 42 U.S.C. § 12203(a), which applies to the
20 Rehabilitation Act by the terms of 29 U.S.C. § 791(g), provides that "[n]o person shall
21 discriminate against any individual because such individual has opposed any act or
22 practice made unlawful by this chapter." Thus, an individual who opposes discrimination
23 because of a disability by filing a complaint with the agency responsible for investigating
24 such complaints engages in activity protected by the Rehabilitation Act. While this
25 restriction comes up most often in the context of an employer and employee, a number
26 of circuits have recognized that it also applies to public programs. See *Alston v. D.C.*,
27 561 F. Supp. 2d 29, 40 (D.D.C. 2008) (collecting cases). To state a claim in these types
28 of cases, a plaintiff must allege 1) that she engaged in protected activity, 2) she was

1 subjected to an adverse action by the defendant, and 3) there is a casual connection
2 between. *Id* (noting that the standard is the same for the ADA and the Rehabilitation
3 Act).

4 The amended complaint addresses these factors indirectly and in conclusory
5 manner. As currently written, it does not meet Rule 8's requirements of clarity and
6 conciseness. However, it is not clear from the face of the amended complaint that Arnold
7 will not be able to amend it to present a "short and plain statement" of a claim based on
8 retaliation in violation of the Rehabilitation Act. Therefore, the Court disagrees with the
9 R&R on this limited ground and finds that this claim should be dismissed without
10 prejudice and Arnold be granted leave to amend.

11 3. 18 U.S.C. § 241

12 As the R&R correctly noted, 18 U.S.C. §241 is a criminal statute and does not
13 create a private right of action. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1048
14 (9th Cir. 2006).

15 4. Equal Protection

16 In order to allege a violation of the Equal Protection Clause, a plaintiff must allege
17 that he or she was treated differently than similarly situated persons. *See, e.g., Okwu v.*
18 *McKim*, 682 F.3d 841, 846 (9th Cir. 2012). Arnold argues "[j]ust because others in the
19 same situation have been treated the same way as plaintiff, does not make it right and
20 just and acceptable and unactionable." (ECF No. 10 at 24.) This simply misstates the
21 standard for an Equal Protection claim.

22 The Court agrees with the R&R that Arnold has not alleged any such facts and
23 has failed to state a claim.

24 5. Due Process

25 The R&R finds that Arnold has not pled a cognizable due process claim because,
26 among other things, he has not alleged the loss of liberty or property. Arnold does not
27 dispute the ability of national parks to regulate camping. Rather, he alleges that officers
28 incorrectly applied regulations to him. But, as the R&R correctly noted, the

1 misapplication did not deprive Arnold of any liberty or property interest. The Court's
2 independent research found no authority which supports the conclusion that a person
3 has a constitutionally protected property right of access to a specific campsite within a
4 national park. Therefore, the Court agrees with the R&R that Arnold has not identified a
5 cognizable due process claim.

6 **6. Fourth Amendment**

7 Arnold has not alleged any search or seizure took place. He alleges that officers
8 threatened to arrest him and seize his belongings if he did not leave his campsite.
9 However, threats alone cannot support a Fourth Amendment claim. See *Thacker v. City*
10 *of Columbus*, 328 F.3d 244, 258 (6th Cir. 2003).

11 **D. Additional Arguments**

12 Arnold makes a number of additional arguments and refers, in passing, to a
13 number of additional legal theories. The Court has reviewed these arguments and
14 determines that they do not warrant discussion as they do not affect the outcome of this
15 order.

16 **E. Dismissal with or without prejudice**

17 A dismissal should not be without leave to amend unless it is clear from the face
18 of the complaint that the action is frivolous and could not be amended to state a federal
19 claim, or the district court lacks subject matter jurisdiction over the action. See *Cato v.*
20 *United States*, 70 F.3d 1103, 1106 (9th Cir.1995) (dismissed as frivolous); *O'Loughlin v.*
21 *Doe*, 920 F.2d 614, 616 (9th Cir.1990). Here, it is not clear from the face of the amended
22 complaint that Arnold would be unable to amend his complaint to state a cognizable
23 retaliation claim in violation of the Rehabilitation Act. While the Court agrees with the
24 Magistrate Judge that Arnold has been given an opportunity to amend his complaint but
25 has failed to assert cognizable claims, the Court will give Arnold another opportunity to
26 amend his complaint. Therefore, Arnold's claim based on a retaliation theory under the
27 Rehabilitation Act is dismissed without prejudice and he is granted leave to amend his
28 complaint, if he so chooses, to present a short and plain description of this claim. If Arnold

1 chooses to file an amended complaint he is advised that an amended complaint
2 supersedes the original complaint and, thus, the amended complaint must be complete
3 in itself. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546
4 (9th Cir. 1989) (holding that “[t]he fact that a party was named in the original complaint is
5 irrelevant; an amended pleading supersedes the original”); see also *Lacey v. Maricopa*
6 *Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims dismissed with
7 prejudice, a plaintiff is not required to reallege such claims in a subsequent amended
8 complaint to preserve them for appeal).

9 All other claims are dismissed with prejudice.

10 **V. CONCLUSION**


11 It is therefore ordered, adjudged and decreed that the Report and
12 Recommendation of Magistrate Judge William G. Cobb (ECF No. 3) is accepted in part.

13 Arnold’s amended complaint (ECF. No. 5) is dismissed without prejudice in
14 regards to his retaliation claim based on the Rehabilitation Act. It is dismissed with
15 prejudice in all other respects.

16 Arnold may file an amended complaint to allege a claim for retaliation under the
17 Rehabilitation Act within thirty (30) days. Failure to file an amended complaint will result
18 in dismissal with prejudice.

19 Arnold includes several “motions” in his objections. (ECF No. 10.) These
20 “motions” must be separately filed. In any event, they are denied as moot in light of the
21 Court’s dismissal of Arnold’s claims.

22 DATED THIS 13th day of June 2016.

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24 
25 _____
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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